No. 80-327

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ALEXANDER L. STEVAS,

IN THE

Supreme Court of the United States

October Term, 1980

VALLEY FORGE CHRISTIAN COLLEGE,

Petitioner,

and

THE UNITED STATES DEPARTMENT OF EDUCATION, THE UNITED STATES OF AMERICA,

Federal Respondents,

v.

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, INC., ANDREW LEIGH GUNN, EDWARD E. DOERR, GIOELE SETTEMBRINI, and E. MALLARY BINNS,

Respondents.

On a Writ of *Certiorari* to the United States Court of Appeals for the Third Circuit

BRIEF OF THE AMERICAN JEWISH CONGRESS ON BEHALF OF ITSELF, THE SYNAGOGUE COUNCIL OF AMERICA AND THE NATIONAL JEWISH COMMUNITY RELATIONS COUNCIL, *AMICI CURIAE*

NATHAN Z. DERSHOWITZ
Attorney for the Amici
American Jewish Congress
15 East 84th Street
New York, New York 10028
(212) 879-4500

MARC D. STERN
Of Counsel

QUESTION PRESENTED

Whether the Court of Appeals correctly held that respondents had standing to challenge, under the Establishment Clause of the First Amendment, a gift of surplus government property to an allegedly sectarian educational institution?

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INTEREST OF THE AMICI

This brief amici curiae is submitted with the consent of the parties by the American Jewish Congress on behalf of itself, The Synagogue Council of America and The National Jewish Community Relations Council.

The American Jewish Congress is a membership organization of American Jews founded in 1918 to protect the religious, political and economic rights of Jews and to promote the principles of democracy. It is committed to the preservation of the great freedoms secured by the First Amendment, and especially the unitary freedoms secured by its Establishment and Free Exercise Clauses.

The Synagogue Council of America is a co-ordinating body consisting of the organizations representing the three divi-

sions of Jewish religious life: Orthodox, Conservative and Reform. It is composed of:

Central Conference of American Rabbis, representing the Reform rabbinate;

Rabbinical Assembly, representing the Conservative rabbinate;

Rabbinical Council of America, representing the Orthodox rabbinate;

Union of American Hebrew Congregations, representing the Reform congregations;

Union of Orthodox Jewish Congregations of America, representing the Orthodox Congregations;

United Synagogue of America, representing the Conservative congregations.

The National Jewish Community Relations Advisory Council is a policy-forming and coordinating body for national and local Jewish organizations concerned with community relations. The constituent organizations of the Council are the American Jewish Congress, American

Organization for Rehabilitation and Training (ORT), Anti-Defamation League of B'nai B'rith, Hadassah, Jewish Labor Committee, Jewish War Veterans of the United States, National Council of Jewish Women, Union of American Hebrew Congregations, Union of Orthodox Jewish Congregations of America, and the United Synagogue of America and the 108 local Jewish Community Councils, representing most communities with significant Jewish populations. The organizations affiliated with the National Jewish Community Relations Advisory Council include in their membership the overwhelming majority of American Jews.

The organizations submitting this brief are committed to the belief that the separation of church and state is essential for the preservation of religious liberty.

It has proved of inestimable value both to religion and to the community generally. Although the organizations signing this brief do not always agree on the precise location of the "wall" between church and state, they agree that the standing issue before this Court in this case is of critical importance to the ability of religious minorities to adequately protect their rights to religious freedom under the religion clauses of the First Amendment.

STATEMENT OF THE CASE

This action was brought in July 1977 by the respondents Americans United for Separation of Church and State* and several of its staff members as individuals (hence-

* Americans United is a non-profit organization devoted to maintaining the separation of church and state. It sued on behalf of itself and its members.

forth referred to collectively as Americans United) to require the then Secretary of Health, Education and Welfare to rescind a transfer of surplus government property to petitioner Valley Forge Christian College made approximately one year earlier pursuant to the Federal Property and Administrative Services Act. 40 U.S.C. § 484(k).

The complaint alleged that Valley Forge Christian College (henceforth petitioners or Valley Forge) was a sectarian institution to which the government could not give financial aid consistent with the Establishment Clause, and that the transfer to it of property valued at over one million dollars constituted such financial aid.

The petitioners, together with HEW, which was also named as a defendant, denied that the transfer violated the Establishment

Clause. As an additional defense, Valley Forge and the government challenged respondents' standing to bring this action.

The District Court found that Americans United did not have taxpayer standing because the transfer of surplus federal property was not an exercise of the spending power under Article I § 8 of the Constitution but rather Congress' power, under Article 4 § 3 cl. 2 "to dispose of ... property belonging to the United States." Relying on Flast v. Cohen, 392 U.S. 83 (1968) the District Court dismissed the suit for want of standing, without considering other possible grounds for finding the existence of standing.

The Court of Appeals for the Third Circuit reversed, 619 F.2d 252 (3rd Cir. 1980). While it agreed that Americans

United did not have taxpayer standing to challenge the transfer, it held that it did have standing to challenge any action of government which infringed on its members' individual rights to the non-establishment of religion.

This Court granted certiorari on February 21, 1981.

SUMMARY OF ARGUMENT

When their claim is analyzed in light of this Court's Establishment Clause jurisprudence, the respondents satisfy both the constitutional and prudential elements of the traditional standing doctrine without regard to theories of taxpayer or citizens' standing. Constitutional standing requires only a showing of injury in fact, attributable to the actions of the defendants. In this case, respondents allege that the gift

of surplus government property improperly infringes on their individual right to be free of governmentally established religion. Those allegations are sufficient to create a case or controversy in the Article III sense.

This Court has also enunciated prudential considerations for determining the existence of standing. It has never held that these considerations may be invoked in cases alleging violations of the individual rights created by the first eight Amendments to the Constitution. In adopting a Bill of Rights, the Founders intended to create rights which could be enforced in the courts. It would therefore be inappropriate for these prudential considerations to be applied here to bar this suit. Even should those considerations be applicable, they

are no bar to the instant lawsuit. Respondents seek to assert their own rights and do not come before the courts merely with a generalized interest in the subject matter.

ARGUMENT

The standing of the respondents to challenge the transfer of surplus property to an allegedly sectarian college is based on now well settled principles. Their standing does not depend on theories of taxpayer or citizens' standing, but on traditional concepts of standing. Respondents' standing to challenge governmental acts which allegedly establish religion by actions other than the expenditure of tax funds is merely an application of the "injury in fact" standard to the somewhat unusual injury prohibited by the Establish-

ment Clause.

I. Respondents Have Constitutional Standing

A. Introduction

The law of standing, as it has evolved since this Court's seminal decisions in Flast v. Cohen, 392 U.S. 83 (1968), and Ass'n of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970), has two distinct aspects. The first, of constitutional dimension, insures that a party seeking to invoke federal court jurisdiction has a "case or controversy" with the defendant. Gladstone Realtors, Inc. v. Village of Bellwood, 441 U.S. 91 (1979).

The other aspect of the doctrine involves "prudential principles" under which "the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and

to limit access to the federal courts to those litigants best suited to assert a particular claim" Gladstone Realtors, Inc. v. Village of Bellwood, supra, 441 U.S. at 99-100 (emphasis added); Warth v. Seldin, 422 U.S. 490, 499-500 (1975). As we show below, both of these aspects of the standing doctrine are satisfied by the respondents. This conclusion rests not only on the straight forward application of these rules to the instant case, but also on the underlying separation of powers principle which has given rise to this two part test.

This Court's recent standing decisions have emphasized the importance of the standing doctrine in insuring that the courts play only their assigned role in a democratic political system. See, e.g., Gladstone Realtors, Inc. v. Village of Bell-

wood, supra, 441 U.S. at 99; Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 37-38 (1976); Flast v. Cohen, supra, 392 U.S. at 94-95. That same concern mandates that a liberal view of standing obtain in Establishment Clause cases, for, as we demonstrate below, it is the courts which, while not alone charged with observance of the Constitution in general, Missouri, Kansas & Texas Railway Co. v. May, 194 U.S. 267, 270 (1904), or the Establishment Clause in particular, must ultimately insure compliance with the supreme law of the land.

B. Respondents' Interest in Remedying a Violation of their Individual Right to Non-Establishment is Sufficient to Confer Constitutional Standing

The constitutional "minima" of standing is that of injury in fact caused by the challenged actions of the defendant. See,

Gladstone Realtors, Inc. v. Village of Bellwood, supra. The injury need not be a tangible economic one. Injury to intangible or abstract interests, such as an individual's interest in a clean and healthy environment, are sufficient to sustain standing, U. S. v. SCRAP, 412 U.S. 669 (1973), for "[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society...." Sierra Club v. Morton, 405 U.S. 727, 734 (1972)

Non-establishment plays an important part in ensuring religious liberty. No less than "environmental well being," it is an important ingredient of the quality of life in our society. It is not surprising, therefore, that this Court has identified an individual's interest in protecting his

right to non-establishment as sufficient to confer standing. "[A] person ..., may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause and the Free Exercise Clause, School District of Abington Twshp. v. Schempp, 374 U.S. 203 (1963)." Ass'n of Data Processing Service Organizations v. Camp, supra, 397 U.S. at 154. Although this holding may well be dispositive here, this Court need not now rest on stare decisis alone, for an analysis of the law of standing in light of Establishment Clause principles confirms its correctness.

The mere existence of an illegal act does not be itself confer standing. In order to have standing a plaintiff must "be himself among the injured."* Sierra Club v.

Morton, supra, 405 U.S. at 735. Whether a plaintiff has himself suffered an injury requires a preliminary inquiry into the nature of the right asserted. U. S. v Richardson. 418 U.S. 166, 174 (1974).

The first eight amendments to the Constitution, of which the right to non-establishment is one, not only set limits on the exercise of governmental power or assign particular tasks to the respective branches of government; they create individual rights, which the judiciary can enforce even to the extent of creating appropriate remedies. See, e.g., Carlson v. Green, 446 U.S. 14 (1980) (8th Amendment); Davis v. Passman, 442 U.S. 228 (1979) (5th

* A plaintiff must also show a causal relationship between the injury and the acts of the defendant, see Warth v. Seldin, supra, but that aspect of standing is easily satisfied here.

Amendment); Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (4th Amendment). Bell v. Hood, 327 U.S. 678, 684 (1946); Dellums v. Powell, 566 F.2d 167, 194-95 (D.C. Cir. 1977) (1st Amendment).

Implicit in the incorporation of the Establishment Clause into the Due Process Clause of the Fourteenth Amendment is a recognition that the Establishment Clause protects an individual's liberty and is not merely a limitation on the power of government, as is the case, for example, with the incompatibility clause. Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974).

In explaining this Court's rejection of the claim that the Establishment Clause was not incorporated into the Due Process Clause of the Fourteenth Amendment because

it does not protect individual rights, Justice Brennan has written:

> [T]he Establishment Clause [is] a co-guarantor, with the Free Exercise Clause, of religious liberty. The Framers did not entrust the liberty of religious beliefs to either clause alone. The Free Exercise Clause "was not to be the full extent of the Amendment's guarantee of freedom from governmental intrusion in matters of faith." (citation omitted)

School District of Abington Twshp. v. Schempp, supra, 374 U.S. at 256. (Brennan, J., concurring opinion). This plainly correct view was endorsed by the Court below, Americans United v. U. S. Dept. of H.E.W, supra, 619 F.2d at 265, and lies at the heart of its decision.

It is true that the Establishment Clause does protect against a form of harm different in kind from most constitutional

injuries. Constitutional injury, as with most other forms of legally cognizable injury, normally involves pecuniary or physical harm, or some restriction on a person's political freedom or civil rights. Coercion of one type or another is thus common to these forms of injury.

By contrast, coercion is not an element of an Establishment Clause violation. School District of Abington Twshp. v. Schempp, supra, 374 U.S. at 223. Standing to challenge a violation of the Clause does not depend upon a showing that plaintiff's right to religious freedom was infringed. School District of Abington Twshp. v. Schempp, supra, 374 U.S. at 224 n.9. The Establishment Clause embodies a broad prophylactic rule against state sponsorship or subsidization of religion, and it prohibits

steps on the road to an established church. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

The Establishment Clause was intended to, and does, prohibit government practices which appear to endorse religion, Stone v. Graham, 101 S. Ct. 192 (1980), for the Founders were convinced that such endorsements result in an atmosphere inevitably inconsistent with religious freedom. They therefore insisted that government remain scrupulously neutral in matters of religion. Judged by these standards, respondents' claim that the gift of the property to Valley Forge Christian College breaches the government's duty of neutrality and impinges on their right to full and complete religious liberty is surely sufficient for purposes of standing.*

* The Establishment Clause is applicable to every

Recognizing that any departure from neutrality is prohibited by the First Amendment, the lower courts have rejected the argument that the special nature of Establishment violations renders them immune to judicial challenge. They have permitted individuals to challenge governmental actions which arguably "pollute the atmosphere" of neutrality in a wide variety of contexts, including at least one which the government states [Brief at 33] cannot properly be the basis for suit because no

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act of Congress, whether it has its source in Article I, § 8, or some other section of the Constitution, including Article 4, § 3, cl. 2. This Court has so held, Reynolds v. U. S., 98 U.S. 145, 152 (1878); cf. Downes v. Bidwell, 182 U.S. 244, 277 (1901).

It is unnecessary for this Court to decide, and amici express no view as to whether a governmental gift of surplus property to an allegedly sectarian institution of higher education in fact unconstitutionally establishes religion.

one has standing to challenge it. Aronow v. U. S., 432 F.2d 242 (9th Cir. 1970) ("In God We Trust" on coins); O'Hair v. Blumenthal, 462 F.Supp 19 (W.D. Texas 1978) aff'd, 588 F.2d 1144 (5th Cir. 1979).

The federal and state courts have repeatedly entertained, on the merits, challenges to the display of religious symbols on public property, in cases not involving governmental expenditures. As the Tenth Circuit put it in Anderson v. Salt Lake City Corp., 475 F.2d 29, 31 (10th Cir. 1973), a challenge to the placement of a religious monument erected with private funds on public property:

> But we think the requisite standing is clearly conferred by non-economic religious values when the plaintiffs assert a litigible interest under the Establishment and Free Exercise Clauses of the Federal Constitution. E.g.,

Allen v. Hickel, 424 F.2d 944, 946 (D.C. Cir. 1970).*

* Accord, A.C.L.U. of Georgia v. Rabun County Chamber of Commerce, Inc., F.Supp. , C79-2035A (N.D. Ga. 1980); Lowe v. City of Eugene, 254 Or. 518, 459 P.2d 222 (1969) cert. denied, 397 U.S. 1042 (1970), on petition to modify judgment sub nom Eugene Sand and Gravel, Inc. v. City of Eugene, 276 Or. 1007, 558 P.2d 338 (1976) cert. denied, 434 U.S. 876 (1977) (cross in park); Paul v. Dade County, 202 So.2d 833 (Fla. App. 1967) (cross near courthouse); State ex rel Singlemann v. Morrison, 57 So.2d 238 (La. App. 1952 (state constitution) (statue in public park); Lawrence v. Buchmueller, 40 Misc.2d 300, 243 N.Y.S.2d 87 (S. Ct. 1963) (creche on public land); Baer v. Kolmorgen, 14 Misc.2d 955, 170 N.Y.S.2d 40 (S. Ct. 1957) (creche on public land). Contra: Brashich v. Port Authority, 484 F.Supp. 697 (S.D.N.Y. 1979) aff'd without published opinion, 628 F.2d 1344 (2nd Cir. 1980). However, it should be noted that, in affirming the decision, the Second Circuit refused to endorse the District Court's holding on the standing issue.

> The Third Circuit's recent decision in Americans United for Separation of Church and State, Inc. v. United States Department of Health, Education and Welfare, No. 79-1221 (3d Cir. April 8, 1980) casts substantial doubt upon the district court's determination that appellant lacks standing to sue. The court there held that alleged injury to a non-economic concern for the separation of church and state conferred stand-

Petitioner Valley Forge recognizes, as it must, that standing exists to redress violations of the right "to live ... in 'a religion free environment.'"*

In view of the scope of the Establishment Clause, several Justices of this Court have indicated a greater willingness to countenance actions under the Establishment Clause than claims arising under other provisions of the Constitution. See Simon v. Eastern Kentucky Welfare Rights Organization, supra, 426 U.S. at 46 (Stewart, J. concurring); Flast v. Cohen, supra, 392 U.S.

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ing upon a nonprofit corporation dedicated to advancing this principle to challenge transfers of land by H.E.W. to religious groups at less than fair market value. See Anderson v. Salt Lake City Corp., 475 F.2d 29 (10th Cir. 1973).

* More accurately, of course, what is involved is the right to live in an environment free of governmentally sponsored and sanctioned religion. Insistence on an environment free of private religious influence would manifest impermissible hostility toward religion.

at 114 (Stewart, J. concurring); Id at 115 (Fortas, J. concurring). What Valley Forge fails to recognize is that the subsidy of religion arguably involved here just as surely implicates that right as do religious symbols on public property.

II. Prudential Considerations Do Not Require a Reversal of the Judgment

In addition to the constitutional requirements for standing, this Court has developed a series of prudential considerations for determining the existence of standing. None of these is a barrier to standing here, even on the assumption -- not supported by this Court's cases -- that prudential considerations can ever bar a claim seeking to vindicate individual rights. See Gladstone Realtors, Inc. v. Village of Bellwood, supra, 441 U.S. at 99-100; Warth

v. Seldin, supra, 422 U.S. at 500.

The first of these considerations is that, ordinarily, the courts will not consider

> "generalized grievance[s]" shared in substantially equal measure by all or a large class of citizens .... E.g., Schlesinger v. Reservists to Stop the War, supra; U. S. v. Richardson, supra; Ex Parte Levitt, 302 U.S. 633, 634 (1937).

Warth v. Seldin, supra, 422 U.S. at 499. The government [Brief at 29-33] makes much of these cases which they deem controlling here, since it is quite true that, if the respondents' position is sustained, any citizen might well be able to challenge the gift at issue in this case.

Nevertheless, this Court has also

> made it clear that standing is not to be denied simply because many people suffer the same injury.... To

> deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion.

U. S. v. SCRAP, supra, 412 U.S. at 687-88. Not surprisingly, the government's brief chooses to pass over this holding in silence.

The apparent conflict between these lines of authority is more apparent than real. In each of the cases in the first group, the plaintiff sought to undo a violation of one of the Constitution's "housekeeping" provisions, which did not result in any harm to the plaintiff other than that suffered by the system (and therefore all citizens as "shareholders" in the system) generally.

By contrast, SCRAP involved a challenge to a governmental action which affected every individual, not merely as a member of the body politic, but as an individual harmed by the actions of another -- although the "other" is the government, and the class of persons injured was co-terminous with the class of all citizens.

This case closely resembles SCRAP, but, because it involves claimed violations of constitutional rights, it presents an even more compelling case for standing. Respondents have suffered individual constitutional harm as the direct result of the actions of the federal government. That millions of others suffer the same harm does not in any way minimize the fact that respondents allege individual harm. Respondents are therefore entitled to a judicial

forum to test the merits of their case.

Underlying the decisions in cases such as Schlesinger, Richardson and Ex Parte Levitt is the perceived need for the judiciary to avoid entanglement in disputes which the political process is capable of resolving -- frequently without the difficulties which a court would face in framing relief. Contrary to the government's suggestion [Brief at 40-42], experience teaches that violations of individual rights are not likely to be resolved in the political process, which, indeed, is most often the source of the violation.*

* The Government goes to great lengths [Brief at 41] to demonstrate that Congress would intervene if federal properties of great importance and value were given to sectarian institutions. The argument is quite beside the point, even assuming that assertion were susceptible to proof. If gifts of surplus property to sectarian institutions violate the Constitution, they would appear to do so, at least for purposes of standing, regardless of whether the gift is the Naval Observatory or, as here, a surplus veterans hospital.

More to the point, it does not much matter whether our view of the government's view of the political process is correct. It was precisely because the states which ratified the Constitution did not wish to entrust their most precious liberties to the majoritarian political process, a Bill of Rights was drafted and adopted:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to * * * freedom of worship * * * and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) (emphasis added).*

* It is worth noting that the government quotes

The Bill of Rights thus has a procedural aspect -- access to the Courts -- absent from those provisions of the Constitution giving rise to the Richardson, Schlesinger and Levitt cases. See also Bell v. Hood, supra, 327 U.S. at 684.

Allowing standing here would not open the Courts to suits by persons with merely a generalized interest in the subject matter who might be interested in attacking every arguable violation of the Establishment Clause. The injury in fact requirement would remain, and it would serve to exclude those who are not injured by a practice which allegedly establishes religion. Thus, a resident of New York would not ordinarily have standing to chal-

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[Brief at 40, n.22] the second sentence ("One's right....) but not the first sentence (the very purpose) which indicates that it is the Courts which are to protect these rights.

lenge the erection of a cross in a Georgia state park, for he is in no way injured by the presence of the cross. But a Georgia resident would -- and should -- have standing even if no governmental funds are involved, and even if he is not compelled to attend the park, ACLU v. Rabun County Chamber of Commerce, supra; Allen v. Hickel, supra; for a government with authority over him is breaching its duty of neutrality in matters of religion by permitting the erection of a religious symbol on public property.

Respondents here are challenging action by the national government which, they allege, indicates favoritism by that government -- to which they owe allegiance and which has authority over them -- to one particular faith in violation of their indi-

vidual rights to be free of such governmental action. Prudential standing rules were not designed to, and should not, bar ligigation of this claim.

None of the other prudential considerations are applicable here. Respondents are seeking to assert their own rights, not those of any person not before the Court. Warth v. Seldin, supra. Nor is there any better party, with more immediate interests as is the case, for example, with religious practices in the public schools. For this reason alone, Doremus v. Bd. of Public Education, 342 U.S. 429 (1952), is distinguishable, even if recent developments in the law of standing and non-establishment have not undermined the validity of that decision as it applies to the facts of this case.

The "better party" aspect of prudential standing is not an open ended invitation to the Courts to refuse to adjudicate cases otherwise within their jurisdiction merely because there may be some person more directly affected than the party seeking to invoke the jurisdiction of the Court. Rather it is designed to insure that the issues are presented in an adversarial posture, Warth v. Seldin, supra. For this limited purpose, it suffices that the party was directly affected as are the respondents.

Finally, we note that this case presents a typical controversy appropriate for judicial resolution. Challenges to government's gifts of property or financial assistance to private institutions are not un-

precedented, whether under the Establishment Clause, Harder v. Town of Ridgefield, 47 LW 2597 (Conn. Super. 1979) or under some other rule of law. See, e.g. Wein v. N. Y., 39 N.Y.2d 136, 383 N.Y.S.2d 225, 347 N.E. 2d 586 (1976) (state constitutional provision forbidding gifts of public money); Foster v. Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973) (same); Fort Sanders Presbyterian Hospital v. Health and Educational Facilities Bd., 453 S.W.2d 771 (Tenn. 1970) (same); Truitt v. Bd. of Public Works, 243 Md. 375, 221 A.2d 370 (1966) (same). In short, even if prudential considerations can ever bar a claimed violation of individual rights, none of the factors enunciated by this Court calls for the courts to abstain from deciding this controversy. The remedy sought --

recission -- is surely common, and would not place the judiciary in the position of determining broad questions of social policy, as was the case in Warth v. Seldin, supra, and Simon v. Eastern Kentucky Welfare Rights Organization.

CONCLUSION

For the reasons stated, the judgment should be affirmed.

Respectfully submitted,

Nathan Z. Dershowitz
Attorney for the Amici
American Jewish Congress
Synagogue Council of America
National Jewish Community Relations Council
15 East 84th Street
New York, New York 10028
(212) 879-4500

Marc D. Stern
Of Counsel